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No. 94-1124

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In The

Supreme Court of the United States

October Term, 1994

R. R. HENSLER,

Petitioner,

vs.

CITY OF GLENDALE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of California, Following Its Unanimous Opinion

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The questions as framed by petitioner seriously misstate the opinion of the California Supreme Court and the issues before this Court. The question presented by this Petition is more properly stated as follows:

> Whether a landowner's regulatory taking claim arising from a condition of subdivision approval, unanimously rejected by the California Supreme Court because the claim is barred by a state statute of limitations, presents a federal question for which this Honorable Court should issue an advisory opinion, merely because the Court's opinion includes an accurate digression discussing the ripeness requirement that is plainly independent from the Courts adequate state law holding.

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RESPONDENT'S BRIEF IN OPPOSITION

The City of Glendale, California (hereafter "City" or "Glendale") respectfully urges this Honorable Court to deny the petition of R.R. Hensler (hereafter "Hensler") for a writ of certiorari to the California Supreme Court to review that Court's unanimous opinion in this cause. Hensler does not, and cannot, show any special or important reason for this Court to review the unanimous decision of the California Supreme Court that Hensler's regulatory taking claim, challenging a condition attached to the City's approval of Hensler's application for a subdivision map, is barred by the statute of limitations set

forth in California Government Code § 66499.37.[1] This is particularly true because Hensler has failed to preserve its federal claim – Hensler has never challenged the constitutionality under the Fifth or Fourteenth Amendments of Government Code § 66499.37, but instead has only litigated below the state law issue of the statute's meaning and application to Hensler's claim.

I.

OPINION BELOW

In addition to the opinions included in the appendix to Hensler's petition, attached to this Brief is the March 23, 1994 order of the California Supreme Court denying the application of "Defenders of Property Rights" for permission to file an amicus curiae brief challenging the constitutionality of Government Code § 66499.37 under the Fifth and Fourteenth Amendments to the United States Constitution, because: "The issue to be argued is outside the scope of issues on which review was granted."[2]

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[1] Unless otherwise noted, all statutory references are to the official codes of the State of California.

[2] In addition to the issues raised by Hensler, Defenders of Property Rights sought leave to argue that Government Code § 66499.37 violated the United States Constitution, claiming: "While a legislature may enact statutes of limitations governing citizens' rights, such statutes must allow the citizen a reasonable time in which to sue to protect his rights. If a statute does not provide a reasonable time to sue, it is unconstitutional." Proposed Amicus Brief, p. 14. Due to the length of this brief, and the fact that it was not accepted by the California Supreme Court, the City has not attached it as an appendix, but would be pleased to make it available to this Court if requested.

II.

JURISDICTION

The City does not concede that this Court has jurisdiction under 28 U.S.C. § 1257(a) to grant certiorari to address a matter of exclusive state concern; *i.e.*, the interpretation of the statute of limitations set forth in Government Code § 66499.37 and its application to challenges to subdivision related decisions filed in the California court system. *See, Agins v. Tiburon*, 447 U.S. 255, 259, n.6 (1980). This is particularly true in the case at bar, because Hensler did not below, and has not in its petition, challenged the constitutionality of Government Code § 66499.37 under the United States Constitution.

III.

STATUTE INVOLVED

Government Code § 66499.37, originally adopted by the California Legislature in 1965 and last amended in 1980 to cut the limitations period in half,[3] provides in full that:

> Any action or proceeding to attack, review, set aside or annul the decision of an advisory agency, appeal board or legislative body concerning a subdivision, or of any of the proceedings, acts or determinations taken, done or made prior to such decision, or to determine the reasonableness, legality or validity of any condition attached thereto, shall not be maintained by

[3] Appendix A to the Petition, at A-28, n.13.

> any person unless such action or proceeding is commenced and service of summons effected within 90 days after the date of such action. Thereafter all persons are barred from any such action or proceeding or any defense of invalidity or unreasonableness of such decision or of such proceedings, acts or determinations. Any such proceeding shall take precedence over all matters of the calendar of the court except criminal, probate, eminent domain and forcible entry and unlawful detainer proceedings.

Hensler's complaint, claiming inverse condemnation solely under Article I, Section 19 of the California Constitution, was filed in September 1989 in the Superior Court of the State of California, County of Los Angeles, nearly 3½ years after the approval of the City Council of Glendale of Hensler's subdivision application.

IV.

STATEMENT OF THE CASE

A. The Underlying Facts

Glendale is the third largest of the 84 cities in Los Angeles County, with a population of over 180,000. *United States Census of Population and Housing, 1960 Through 1990.* After a modest increase of only 6,300 people throughout the 1970's, the City allowed rapid residential growth to take place throughout the 1980's. *Id.* Glendale's population of 139,060 in 1980 increased 29.5% during the decade. *Id.*

In March of 1981 the City enacted its "Major Ridge Line Ordinance" (hereafter "Ridge Line Ordinance"),

which prohibited construction of homes on designated, major ridge lines within the City. Appendix A at A-3 and n.2; Appendix C at C-3 and n.2.[4] The Ridge Line Ordinance "was enacted pursuant to the authority granted by the Subdivision Map Act." Appendix A at A-2 n.2. The Ridge Line Ordinance codified a condition previously imposed on Hensler in a prior application for subdivision approval (and accepted by Hensler at that time, see footnote 7, *infra*) and expanded it City-wide by requiring, with certain exceptions, developers of properties containing major ridge lines to preserve these ridge lines as open space. The Ridge Line Ordinance states that its intent and purpose is as follows:

> The city is experiencing unprecedented hillside subdivision development which without proper planning may destroy major ridge lines which are an exhaustible and precious scenic resource of the city and its citizens; it is necessary that subdivision developers include with their tentative tract maps, plans for the preservation of major ridge lines.

Section 28-2.1(a), quoted at Appendix A, A-3 n.2.[5]

The Ridge Line Ordinance regulates development of "engineered slopes, housing construction, streets, utilities, or other man-made features" with areas designated as "major ridge line areas" by the ordinance. *Id.* Section

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[4] All references to Appendix A, B, C or E are to the underlying opinions attached as appendices to the petition.

[5] Not coincidentally, this language is similar to the ordinance of the Town of Tiburon approved just prior to Glendale's action by this Honorable Court in *Agins v. Tiburon*, *supra*, 447 U.S. at 261, n.8.

28.2.1(d) authorizes certain exceptions for public roadways necessary to aid traffic circulation, provide emergency access or egress, or otherwise promote public health, safety and general welfare. Hensler alleged that the Ridge Line Ordinance barred development on forty percent (40%) of Hensler's property, referred to by Hensler as the "Affected Property."[6] Appendix A at A-4, Appendix C at C-3.

After "temporarily abating" development plans for twenty months after the court's decision in *Stevens v. City of Glendale*, 125 Cal.App.3d 986, 990 (1981),[7] between June

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[6] Hensler's complaint states that " . . . by virtue of [the Ridge Line Ordinance] defendant City sought to prohibit all developments of major ridge lines, including those upon plaintiff's property, which constituted approximately 40% of the total area of all the property ('Affected Property')." Hensler's complaint ¶ 7.

[7] The Hensler property at issue in this action has been one of the most controversial properties in the City of Glendale over the last 20 years. Three times over the last twenty years Hensler has made application to the City to develop his property and three times the City has approved Hensler's permit application. Unfortunately, after each approval the City has been sued in an action that resulted in a published opinion. The first two lawsuits were actions brought pursuant to the California Environmental Quality Act or CEQA (Public Resources Code section 21000, *et seq.*) by neighbors of Hensler attempting to thwart development of the Hensler property, while this third action has been brought by Hensler who after subdividing and selling his property now seeks to challenge conditions of the City's subdivision approval as a taking under California law.

The first action challenged the Environmental Impact Report (EIR) prepared by the City for a project to fill canyons on Hensler's property with over one and one-half (1½) million cubic yards of dirt left over from construction of a state highway

28, 1983 and July 24, 1984, Hensler alleged that he submitted three different development plans to the City, again proposing the construction of residential units on

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(Highway 2) that Hensler and others were constructing, together with the grading of an additional 343,000 cubic yards of dirt to form a road connecting the "leveled" Hensler property with adjacent subdivisions. *Day v. City of Glendale*, 51 Cal.App.3d 817, 819-20 (1975). The Court of Appeal ruled that Glendale had to prepare an EIR, stating, "the issuance of a grading permit is the only point at which the environmental impact of the project may be publicly considered before mountains are moved and 70 acres of canyon are filled." *Id.* However, because no stay was ever requested in the action, the grading was substantially completed prior to the finality of the court's ruling. *Id.* The issue of the connecting road was to be revisited in the next lawsuit against the City involving Hensler's property.

Only fifteen months after the appellate court decision in *Day* was final, Hensler and his partner on March 25, 1977, filed an application for a tentative subdivision map (Government Code section 66452) with the City to construct 830 homes on the now 309 acres of property they had acquired in the San Rafael Hills (the same 309 acres at issue in the case at bar). *Stevens v. City of Glendale, supra*, 125 Cal.App.3d at 990. A draft EIR was completed by the City on June 13, 1978, and after public hearing on December 12, 1978 a final EIR was certified and the tentative tract map was approved. *Id.* at 990-91. Mr. Stevens, joined by a homeowners' group, the Chevy Chase Estates Association, challenged both the City's approval of the tentative tract map and the City's compliance with CEQA.

In approving the project, the City added three "mitigation measures" which the court found "substantially lessened or avoided significant environmental impacts of the project." *Stevens*, 125 Cal.App.3d at 995. These mitigation measures included the extension of a street into a neighboring community, reduction in density to 640 units, and ***"that the primary ridgeline in the project be retained in a natural state."*** *Id.* at 990 (emphasis added). Hensler agreed at that time to these

the tract. Appendix C at C-3. During this same period, over five years before filing the case at bar, Hensler alleges that he was advised by City representatives that any application to develop the ridge line "Affected Property" would be rejected and would be futile. Appendix A at A-4; Appendix C at C-3.

The City approved the third of Hensler's development proposals (after slightly reducing the density from 596 units to 588 units) on April 1, 1986. Appendix A at A-4; Appendix C at C-3. Hensler alleges that pursuant to the Ridge Line Ordinance, the City's approval of Hensler's tentative subdivision map was conditioned by a ban on home construction in the forty percent (40%) of the property labelled as the "Affected Property." The

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conditions and indeed, participated as real party in interest in defending the City's decisions. *Id.* at 989.

In approving the City's condition maintaining the primary ridge line, the court relied upon the City's 1978 amendment to the housing element of its General Plan, and its open space, recreation and conservation element. The court quoted the following portion of the City's General Plan:

> The project, which is the subject of this action, is located in the community designated as "the San Rafael Hills." The open space plan states: "One of the priorities for the San Rafael Hills, as for the Verdugo Mountains, will be the preservation of the ridge lines."

Stevens, 125 Cal.App.3d at 994.

The matter was remanded to the trial court in November of 1981, with directions that the City give notice in compliance with CEQA of the mitigation measure to extend the connecting "A" Street to neighboring properties. At that time, according to the complaint rather than continue with his application in the face of community disapproval, Hensler "temporarily abated" his attempt to develop on the property. Appendix C at C-2.

complaint attached and incorporated by reference as Exhibit 1 Hensler's approved tentative tract map showing the 588 subdivided lots, internal streets and improvements and the "Affected Property."[8] Later, after receiving this final approval, Hensler sold his property to third parties which completed construction of the subdivision development. Appendix C at C-4, n.3.

On September 28, 1989, almost three and one-half (3½) years after the City's approval of this major development proposal, and eight and one-half (8½) years after enactment of the Ridge Line Ordinance, Hensler filed this lawsuit in California state court.[9] Hensler alleges that the City's regulation on development of the "Affected Property" constituted a compensable taking under the California Constitution.

B. Underlying Court Proceedings

The trial court, appellate court and California Supreme Court, without a single judge or justice in dissent, has each held that this action was barred by

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[8] This Exhibit 1 clearly shows that one of the two roads providing needed access to the 588 homes in Hensler's subdivision was cut through the Major Ridge Line. This road is referred to as "A" Street in the *Stevens* opinion. 125 Cal.App.3d at 990.

[9] The *Stevens* opinion further demonstrates that the protection of the ridge line on Hensler's property was a long time goal of the City's General Plan and that no later than 1978, 11 years before filing the instant action, Hensler knew (and accepted) the fact that any approval of a subdivision on his property would be conditioned on not building homes on the Affected Property. 125 Cal.App.3d at 990.

California's statute of limitations governing challenges to local government's subdivision decisions.

After Hensler filed his complaint for inverse condemnation under the California Constitution on September 28, 1989, a hearing on the City's demurrer to Hensler's complaint was held on April 16, 1990. On May 11, 1990, the California Superior Court sustained the City's demurrer without leave to amend, holding that Hensler's complaint was fatally defective for the reasons set forth in the City's demurrer, including the following:

1. "The action is barred by the statute of limitations";

2. Hensler "has waived any challenge to the conditions of the subdivision approval";

3. Hensler "has failed to allege facts sufficient to constitute a 'taking' of property without just compensation"; and

4. "As a matter of law, [Hensler] has not been deprived of substantially all reasonable use of his property." Appendix E at E-1 to E-2.

Hensler appealed this order and subsequent judgment. Each of the four rulings made by the trial court was fully briefed by both Hensler and the City. On March 3, 1993, the Court of Appeal for the Second District, Division Four, issued its unanimous opinion affirming the Superior Court's judgment.[10] Hensler's petition for

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[10] In light of its decision holding that Hensler's lawsuit was time-barred, neither appellate ruling addressed these other

rehearing was denied on March 25, 1993. Hensler's petition for review to the California Supreme Court followed and was granted on May 27, 1993.

The California Supreme Court unanimously affirmed the appellate court's opinion on July 25, 1994 (Appendix A) and denied Hensler's petition for rehearing on September 22, 1994 (Appendix B).

In reaching its decision, the California Supreme Court thought equally important the matters that Hensler's complaint tacitly admits, including the following:

a. "The complaint does not allege facts to establish that title to the land was affected by enactment of the ordinance or that a physical invasion of the land took place."[11] Appendix A at A-27.

b. The complaint "does not allege that a taking has already been judicially established." Appendix A at A-29.

c. Hensler's "complaint acknowledges that development has been permitted on part of his property, and thus concedes that the Glendale ordinance did not

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issues. Appendix A at A-4 to A-5, n.3; Appendix C at C-3, n.1; *but see* Appendix A at A-20 to A-21 (waiver of taking claim).

[11] This fact distinguishes the case at bar from *Dolan v. City of Tigard*, ___ U.S. ___, 114 S.Ct. 2309, 2316, 129 L.Ed.2d 304 (1994), and *Kaiser Aetna v. United States*, 444 U.S. 164, 179-180 (1979), because Hensler has no claim that the City's condition involves a "requirement that [he] deed portion of property to the city" (*Dolan*) or that it "extinguishes a fundamental attribute of ownership" (*Kaiser*).

deny him all economically feasible use of the property."[12] Appendix A at A-11.

All three courts that have reviewed Hensler's complaint have agreed that its fatal flaw is Hensler's failure to seek any judicial review for such a long period, whether one counts the eight years from the adoption of the Ridge Line Ordinance or the nearly 3½ years from the imposition of the condition of approval on Hensler's subdivision prohibiting construction of buildings in the Affected Property. With not a single dissent these jurists have held that Hensler's claim is barred under state law by his failure to comply with Government Code § 66499.37.

V.

REASONS FOR DENYING THE WRIT

The City respectfully submits that this case clearly does not warrant review by this Honorable Court, for the following reasons.

1. The California Supreme Court's unanimous opinion in this case was based on exclusive and adequate

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[12] *See, Dolan v. City of Tigard, supra,* 114 S.Ct. at 2316, n.6 ("There can be no argument that the permit conditions deprive petitioner 'economically beneficial us[e]' of her property as she currently operates a retail store on the lot. Petitioner assuredly is able to derive some economic use from her property.") (citations omitted).

state grounds, *i.e.*, the application of the statute of limitations contained in Government Code § 66499.37 to regulatory takings challenges of subdivision decisions applying ordinances adopted pursuant to the Subdivision Map Act. This was the sole issue before the Court and its sole holding. Or, as the appellate court stated in its opinion, "Here the issue is not the form of action implemented by the property owner, ***but his excessive delay in doing anything***." Appendix C at C-10 (emphasis added).

2. Despite Hensler's claim to the contrary, the California Supreme Court did not hold that a landowner complaining of an uncompensated regulatory taking is required to file an action seeking a writ of administrative mandate, as Hensler claims. Petition, at 14-15. Instead, the Court was quite clear that it was not adding a new judicial hurdle to landowners, but was simply holding that a regulatory taking claim based upon a condition of subdivision approval must be brought within 90 days of the decision, "whether or not" it is filed separately or joined with an action for a writ of administrative mandate. Appendix A at A-1

3. The California Supreme Court's précis of this Honorable Court's regulatory takings precedents does not create new hurdles to landowners, as Hensler claims, but rather simply reiterates the ripeness requirement laid down by this Court in a number of land use decisions over the last fifteen years.

A. The California Supreme Court's Unanimous Opinion In This Case Rests On Adequate State Grounds And Thus Does Not Raise A Federal Question Appropriate For Review By This Court

Hensler's Petition ignores the fact that the California Supreme Court's unanimous opinion sustaining Glendale's demurrer was based upon the Court's interpretation of Government Code § 66499.37. It is submitted that Hensler's objection to the California Supreme Court's application of state law does not raise a federal question appropriate for review by this Honorable Court. *E.g., Agins, supra,* 447 U.S. at 259, n.6.

1. This Court Should Not Exercise Discretionary Jurisdiction When A State Court Opinion Plainly Rests On Adequate State Grounds

This Court has long held that it will not review a state court judgment based upon an adequate and independent state ground, even though a federal question was also involved and it is claimed that it was wrongly decided. *E.g., Murdock v. Memphis,* 87 U.S. 590, 636 (1874); *Michigan v. Long,* 463 U.S. 1032, 1041-42 (1983).

> The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render

> an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945).

Every judge or justice who has ever reviewed Hensler's complaint has concluded it is time barred by Government Code § 66499.37, and would undoubtedly do so again even if this Court accepted this case for review and reversed the State Court's judgment for further proceedings. It is respectfully submitted that this Court should not issue to Hensler an advisory opinion that cannot have an effect on the judgment in this case.

2. The California Supreme Court's Unanimous Opinion In This Case Plainly Rests On Its Interpretation Of A California Statute of Limitations

The California Supreme Court's unanimous opinion in this matter makes clear that its ruling is based upon its interpretation of a matter of state law – which statute of limitations applies in this action. Below, Hensler asserted that either the five or three year "catch all" statute of limitations set forth in Code of Civil Procedure §§ 318, 319 or 338 governed his claim.[13] Based solely on its interpretation of California statutory and case law, the Court held:

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[13] The Court had no problem rejecting Hensler's claim that "a new cause of action arises each day the city fails to compensate him" because landowners "cannot know the point in time at which the taking occurs and the statute of limitations commences running." Appendix A at A-24. The Court pointed out

Plaintiff argues alternatively that Code of Civil Procedure sections 318, 319, or 338 apply. They do not. They are applicable only if no "different limitation is prescribed by statute." (Code Civ. Proc., § 312.) Government Code section 66499.37 is a "different limitation" which now governs actions in which such issues are raised.

* * *

"The 'patent legislative objective' of [section 66499.37] is to ensure that judicial resolution of Subdivision Map Act disputes occurs 'as expeditiously as is consistent with the requirements of due process of law.' " (*Hunt v. County of Shasta* (1990) 225 Cal.App.3d 432, 442.) As the Court of Appeal recognized here and in *Hunt*, section 66499.37 applies by its terms to ***any*** action involving a controversy over or arising out of the Subdivision Map Act. Therefore, if this is a claim arising out of application of a land use regulation authorized by that act, section 66499.37 applies. Plaintiff seeks to avoid application of section 66499.37 by arguing he does not challenge the validity of the Glendale ordinance. He seeks only compensation for the taking he alleges was effected by the ordinance. He contends on that basis that the statutes of

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that (1) the case relied upon by Hensler was a ***physical*** taking case (*id.* at A-25), and (2) "if the challenge is to the application of the regulation to a specific piece of property, the statute of limitations for initiating a judicial challenge to the administrative action runs from the date of the final adjudicatory administrative decision," which in Hensler's case was nearly 3½ years prior to the filing of the action (*id.* (footnote omitted)).

> limitation found in the Code of Civil Procedure govern this action. We disagree.

Appendix A at A-26.

The Court, relying solely on legislative intent and California appellate rulings interpreting Government Code § 66499.37,[14] held that:

> When the gravamen of the cause of action is a claim that a land use ordinance or regulation enacted under the authority of the Subdivision Map Act, or administrative actions taken pursuant to such an ordinance or regulation, has had the effect of "taking" the plaintiff's property without compensation, the action necessarily challenges the validity either of the ordinance or regulation or of the acts taken by the local agency or appeal board pursuant to the ordinance or regulation. This follows because, as we have explained above, only if the ordinance or regulation would be invalid on its face or as applied unless compensation is paid to an affected landowner, is a claim in inverse condemnation meritorious. Therefore, the constitutional validity of the ordinance as it affects the plaintiff's property must be litigated in any

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[14] These concurring opinions include *Presenting Jamul v. Board of Supervisors*, 231 Cal.App.3d 665, 670-672 (1991); *Hunt v. County of Shasta*, 225 Cal.App.3d 432, 441 (1990); *Griffis v. County of Mono*, 163 Cal.App.3d 414 (1985); *Kirk v. County of San Luis Obispo*, 156 Cal.App.3d 453 (1984); *Soderling v. City of Santa Monica*, 142 Cal.App.3d 501 (1983); *Resource Defense Fund v. County of Santa Cruz*, 133 Cal.App.3d 800 (1982); *Camp v. Board of Supervisors*, 123 Cal.App.3d 334 (1981); *Kriebel v. City Council*, 112 Cal.App.3d 693 (1980); *Timberidge Enterprises, Inc. v. Santa Rosa*, 86 Cal.App.3d 873, 886-887 (1978).

> inverse condemnation action which does not allege that a taking has already been judicially established.
>
> Section 66499.37 mandates that: "***Any*** action or proceeding ***to attack, review, . . . the decision of an advisory agency, appeal board or legislative body concerning a subdivision,*** . . . or to determine the reasonableness, legality or validity of any condition attached thereto, shall not be maintained by any person unless such action or proceeding is commenced and service of summons effected within 90 days after the date of such decision. Thereafter all persons are barred from any such action or proceeding or any defense of invalidity or unreasonableness of such decision or of such proceedings, acts or determinations." (Italics added.)
>
> This section is not, as plaintiff argues, limited to actions for specific relief. It includes actions for compensation for a regulatory taking because the validity of the ordinance or its application to the plaintiff's property, if uncompensated, must be determined in the action – i.e., the court must determine if there has been a taking. Before he or she is entitled to any relief, either compensation or exemption of the property from the development restriction, the plaintiff must establish that the ordinance, regulation, or administrative action is not lawful or constitutionally valid if no compensation is paid. The action therefore comes within the broad language of section 66499.37.

Appendix A at A-29.

"Section 66499.37 was enacted to ensure that ***any*** challenge to local legislative or administrative acts or

decisions taken pursuant to ordinances enacted under the authority of the Subdivision Map Act will be brought promptly." Appendix A at A-2 (emphasis in original). There can be no doubt but that the California Supreme Court's holding was based upon its interpretation of the preclusive effect of Government Code § 66499.37, which is an adequate state ground, and not on any federal question.

B. The California Supreme Court's Abstract Of Regulatory Takings Jurisprudence Is Both Dicta And Correct

While Hensler asserts that the California Supreme Court has placed hurdles in the course of landowners seeking to recover compensation for an as applied regulatory taking, the Court's opinion correctly abstracts this Court's ripeness rule.[15] Because this issue is irrelevant

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[15] Nor does California law unfairly delay or cause unwarranted expense to the landowner under the California Court's ruling below. "As noted above, the inverse condemnation proceeding may be joined with the petition for writ of mandate. Thus, there is no extended delay, and, as the court held in *First Lutheran Church v. Los Angeles, supra,* 482 U.S. 304, the landowner is entitled to damages for any loss of use of the property beyond that to be expected as part of the normal permit process. Moreover, the expense of a meritorious taking claim will not be borne by the owner. Not only are damages for a temporary taking available, but the owner's reasonable costs and attorney fees must be reimbursed by the local entity if the owner establishes that the restriction on land use is a compensable taking. (Code Civ. Proc., § 1036; *Locklin* v. *City of Lafayette* (1994) 7 Cal.4th 327, 375-377; *Greater Westchester Homeowners Assn.* v. *City of Los Angeles* (1979) 26 Cal.3d 86, 104; *In re Development*

given the ruling below on the preclusive effect of Government Code § 66499.37, the City will not burden this Court with a point-by-point rebuttal to Hensler's claims. Instead, the City will offer a few summary comments.

Hensler creates a straw man by claiming that the California Supreme Court's opinion below requires a judicial writ of mandate action as a prerequisite to an inverse condemnation claim asserting a regulatory taking. Petition, at 15. In fact the unanimous opinion merely states that the 90 day statute of limitations of Government Code § 66499.37 applies regardless of the form of challenge brought by a landowner challenging a condition of subdivision approval.

> We conclude that an action in inverse condemnation, ***whether or not joined*** with an action in administrative mandamus (Code Civ. Proc., § 1094.5) challenging the ordinance or its application to the plaintiff's property, is governed by Government Code section 66499.37. . . .

Appendix A at A-1 (emphasis added).

Nor does the California Supreme Court's opinion below misstate the ripeness requirement. In *Williamson County Regional Planning Comm. v. Hamilton Bank*, 473 U.S. 172 (1985), this Court held: "Because respondent has not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property, nor utilized the procedures Tennessee provides for obtaining just compensation, respondent's claim is not

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Plan for Bunker Hill (1964) 61 Cal.2d 21, 71.)" Appendix A at A-14.

ripe." 473 U.S. 172, 186. This is exactly the holding that the California Court's ruling below promotes.

This Court strongly stated in *Williamson County*, 473 U.S. 172, 190-191, that the ripeness inquiry is "compelled by the very nature of" the Fifth Amendment.[16] As this Court held:

> As in *Hodel, Agins,* and *Penn Central,* then, respondent has not yet obtained a final decision regarding how it will be allowed to develop its property. Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. Although "[t]he question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty," *Penn Central Transp. Co. v. New York City,* 438 U.S., at 123, 98 S.Ct., at 2659, this Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. [Citations.] Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

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[16] Hensler fails to inform this Honorable Court that *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982), which Hensler relies upon as the basis of his claim that the opinion in the case at bar creates a "head on conflict" with federal decision law (Petition, at 15, n.9), has been fully explained and distinguished in *Williamson County, supra*, 473 U.S. at 192.

Thus, this Court has expressed the absolute need for a final determination in order for any court to be in a position to do its job.

Moreover, although the ripeness doctrine was developed in three 1980s United States Supreme Court decisions decided before this Court's decision in *First English Evangelical Church v. County of Los Angeles*, 482 U.S. 304 (1987),[17] this Honorable Court has continued to stress the ripeness requirement in its regulatory takings decisions issued after 1987. For example, in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), this Court refused to determine whether a provision of San Jose's rent control ordinance constituted a taking because the City had not yet finally applied the challenged provision to any landlord's application for a hardship rent increase. Only three terms ago, in *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), this Court expressly held that the ripeness requirement "would preclude review" of the regulatory takings challenge to South Carolina's beachfront development restriction but for the fact that the South Carolina Supreme Court had expressly refused to rest its decision on ripeness grounds and "had shrugged off the possibility of further administrative and [state court] trial proceedings."[18] *Lucas, supra*, 112 S.Ct. at 2891.

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[17] *Williamson County, supra*, 473 U.S. 172; *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 636 (1981); and *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986). These cases followed this Court's first reference to the ripeness requirement in the context of regulatory takings in *Agins v. Tiburon, supra*, 447 U.S. at 260.

[18] For this reason, Hensler is wrong to assert that the petitioner in *Lucas* made a permissible election to admit validity and

Hensler commits further error in claiming that he did not have to challenge the condition establishing the Affected Property because the City's 1986 decision on Hensler's subdivision application came one year prior to this Court's decision in *First English, supra,* 482 U.S. 304.[19] Nothing in either the California or United States Supreme Courts' opinion in *Agins* prevented Hensler from filing an action for an administrative writ of mandate within 90 days of the City's subdivision approval in April 1986 to seek review of any condition of approval. Moreover, nothing in this Court's opinion in *Agins* prevented Hensler from seeking damages in such a case pursuant to Code of Civil Procedure section 1095.

Despite Hensler's assertions, this Court's decisions "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *Lucas, supra,* 112 S.Ct. at 2891 (internal quotation marks and citations omitted). As this Honorable Court has perceptively observed: "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates, supra,* 477 U.S. at 348. Hensler seeks to ignore the critical analysis performed by the California Supreme

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seek only damages. Petition, at 7. This Court simply stated that it was bound by the unchallenged ruling of the sovereign court of the State of South Carolina that the case was ripe for adjudication. *Lucas, supra,* 112 S.Ct. at 2891.

[19] Of course even if accepted, this argument does not explain why Hensler still waited over 2¼ years after this Court's 1987 decision in *First English* to file the instant action which is governed by a 90 day statute of limitations.

Court by the simple expedient of setting this Court's precedents on their head – giving the property owner and not the government the option of determining whether to pay damages for a ***permanent*** taking or whether to modify or rescind the offending regulation.[20]

C. Hensler's Ad Hominem Attack On The California Judiciary Is Unwarranted, And Fails To Assist The Principled Resolution Of The Issues Involved

Hensler's Petition sets out an undeserved, ad hominem attack on California's courts. Hensler's polemics do little to assist this Court in resolving the issue in controversy. The City will not burden the Court with a point-by-point refutation of Hensler's rhetorical excesses. Instead, the City offers a few brief observations.

First, one would think that quotation and citation to articles written ten, fifteen and even (in two instances) twenty years ago that attack the California courts would be recognized as inappropriate in denigrating a Supreme Court whose justices, with a single exception, were not members of the Court when these articles were written. Second, it is the California Legislature and not the courts which adopted and then halved the statute of limitations

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[20] Hensler's claim that a landowner need not seek a variance runs counter to this Court's statement in *Williamson County, supra*, 473 U.S. at 191, n. 12, that "it is impossible to determine the extent of the loss until the Commission has decided whether it will grant a variance from the application of the regulations."

set forth in Government Code § 66499.37. As the California Supreme Court's opinion held, the reason for the amendment reducing the statute of limitations to 90 days was not to harm landowners; rather, "the Legislature explained that changes in the law were needed to expedite the permit process and thereby encourage the development of new housing." Appendix A at A-28 to A-29, n.13. Third, short statute of limitations have been adopted by the California Legislature in many land use contexts, not simply in cases challenging subdivision related decisions.[21]

Hensler would be better served by focusing on the applicable case law, rather than isolated excerpts from the editorial writings of selected, long-time combatants in the California and national land use wars. An objective view of the cases from California and other jurisdictions reveals that the "conflict" Hensler posits between California and its other jurisdictions is a false one.

Space does not permit an encyclopedic recitation of the regulatory takings jurisprudence developed by the

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[21] "Section 66499.37 is not unique in establishing a requirement that challenges to the actions of an administrative agency be brought promptly. In addition to that section and Public Resources Code section 30801 [challenges to decisions of the California Coastal Commission – 60 days], the following statues establish such requirements: Code of Civil Procedure section 1094.5 (administrative mandamus – 90 days); Public Resources Code section 21167 (California Environmental Quality Act decisions – 30-180 days); Government Code sections 65901, 65903, 65907 – variances, conditional use and permits, board of zoning adjustment – 90 days) [sic]." Appendix A at A-34.

California courts relative to that articulated in other jurisdictions. Suffice it to say that an unbiased examination demonstrates California inverse condemnation decisions to be firmly within the constitutional mainstream developed by other state and federal courts. See, e.g., *Stevens v. City of Cannon Beach*, 317 Or. 131, 854 P.2d 449 (1993), *cert. denied*, 114 S.Ct. 1332, 127 L.Ed.2d 679 (1994) (Oregon Supreme Court found without merit post-Lucas regulatory takings challenge to municipal ban on development of privately-owned dry sand beach parcels); *Kelly v. Tahoe Regional Planning Agency*, 109 Nev. 638, 855 P.2d 1027, *cert. denied*, 114 S.Ct. 684, 126 L.Ed.2d 652 (1994) (Nevada Supreme Court rejected regulatory takings challenge to regional land use plan, rebuffing landowner's narrow interpretation of "denominator" issue); *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796 (Fed.Cir. 1993) (accord, in federal wetlands regulation context); *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 924, 127 L.Ed.2d 217 (1994) (property owner's regulatory takings claimed deemed to accrue, for purposes of applicable one-year statute of limitations, upon enactment of the challenged ordinance); *Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84 (2nd Cir. 1992), *cert. denied*, 113 S.Ct. 1586, 123 L.Ed.2d 153 (1993) (rejecting inverse condemnation challenge to state denial of land use permit based on perceived adverse impacts on wildlife); *Preseault v. United States*, 27 Fed.Cl. 69 (1992) (on remand from U.S. Supreme Court, Court of Federal Claims held that National Trails System Act effected no taking of private property); *Presbytery of Seattle v. King County*, 114 Wash.2d 320, 787 P.2d 907, *cert. denied*, 498 U.S. 911 (1990) (municipal ordinance prohibiting development of portion of

undivided parcel does not trigger compensable taking of restricted segment).

Far from being "idiosyncratic" or "in complete disregard of landowners' constitutional rights"[22] (Petition, at 22), California state court regulatory takings precedents are altogether consistent with the majority of reported inverse condemnation decisions from other jurisdictions.[23] While this Court should deny Hensler's petition

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[22] While exhaustive citation to California published opinions is hardly warranted by Hensler's claims, a single citation will suffice. Any court system that authors opinions such as *Healing v. California Coastal Com'n*, 22 Cal.App.4th 1158 (1994) (cited with approval in the case below, Appendix A at A-15 to A-16), can hardly be said to be the court system "least likely to protect landowner rights." Petition, at 23. Indeed, *Healing* makes clear that, far from creating unnecessary procedural hurdles, California's system potentially allows aggrieved landowners such as Hensler two judicial "bites of the apple" in challenging conditions of permit approval; (1) an administrative mandate proceeding before a court which accords the landowner a *de novo* review on the record below or as augmented, and (2) a full blown court trial on an inverse condemnation claim. 22 Cal.App.4th at 1170; summarized in case below, Appendix A at A-15 to A-16.

[23] While Hensler points to two eight (8) year old decisions of this Court reversing a California appellate published and unpublished decision, respectively, he fails to note the more recent decisions of this Court affirming California court opinions in *Yee v. City of Escondido*, 112 S.Ct. 1522, 118 L.Ed. 153 (1992), and *Pennell v. City of San Jose, supra*, 485 U.S. 1. In *Yee* this Court held that the California courts' interpretation of regulatory takings jurisprudence in the context of mobile home rent control was correct while the rulings of the federal judiciary were in error (*e.g., Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988)).

because the California Supreme Court's unanimous opinion rests on an adequate state law grounds, this Court should not allow Hensler's high-flying rhetoric to sway this Court into anything less than full blown applause for the excellent précis of the ripeness requirement in the opinion below.

VI.

CONCLUSION

Hensler's attempt to seek certiorari is nothing more than a futile attempt to rewrite the last fifteen years of United States Supreme Court jurisprudence on the ripeness requirement. It should not be countenanced because: (1) this is the wrong case in which to attempt such an effort – the California Court's decision rests on adequate state grounds, its interpretation of Government Code § 66499.37; and (2) as the California Supreme Court noted, to do so would impermissibly shift the "option of exempting the property from the ordinance or regulation, or even repealing the ordinance as an alternative to paying compensation for a permanent taking" from the city to the landowner.[24] Appendix A at A-9.

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[24] In making this statement, the California Court relied upon the following pronouncement of this Court in *First English, supra*, 482 U.S. at 319:

> Nothing we say today is intended to abrogate the principle that the decision to exercise the power of eminent domain is a legislative function. . . . Once a court determines that a taking has occurred, the government retains the whole range of options already

For all the foregoing reasons, the City respectfully submits that this case clearly does not warrant review by this Honorable Court. The City urges this Honorable Court to deny Hensler's petition for a writ of certiorari.

Respectfully submitted,

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City of Glendale

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available – amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain.

App. 1

No. S032210

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

(Filed Mar. 23, 1994)

R.R. HENSLER, Appellant

v.

CITY OF GLENDALE, Respondent

The application of Defenders of Property Rights for permission to file an amicus curiae brief in support of Appellant is hereby denied. The issue to be argued is outside the scope of issues on which review was granted.

LUCAS
Chief Justice